BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland

(AB-2000-12)

Third-Participant Submission of the United States

December 1, 2000

Table of Contents

I. Introduction

1. The United States welcomes this opportunity to present its views in this proceeding on *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, September 28, 2000 ("Panel Report"). Many of the issues before the Panel involved questions of fact that were either unclear or were in dispute. Therefore, as was the case before the Panel, the United States does not intend to comment upon the specific factual matters at issue in this dispute. Rather, the United States intends to limit its comments to certain fundamental issues relating to the proper legal interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Antidumping Agreement").

II. Adequacy of the Panel Request

2. In its appellant submission, Thailand contests the Panel's refusal to dismiss Poland's claims under Articles 2, 3, and 5 of the Antidumping Agreement on account of an allegedly insufficient panel request. The United States believes that certain aspects of the reasoning that the Panel used in rejecting Thailand's request were erroneous.

A. The "Attendant Circumstances" Surrounding a Panel Request Do Not Include the Underlying Antidumping Investigation

3. In evaluating Thailand's challenges to Poland's claims under Articles 2 and 5 of the Antidumping Agreement, the Panel referenced the Appellate Body's statement that "[t]here may be situations where the simple listing of the articles of the agreement or agreements involved may, *in the light of the attendant circumstances*, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint."[1] The Panel then includes among such "attendant circumstances" the fact that the dispute involved several issues that Poland raised before the Thai investigating authorities during the underlying antidumping investigation.[2] In the Panel's view, "the fact that an issue was raised during the underlying investigation means that it involves considerations of which the government of the defending Member would be aware, and would involve evidence in the possession of that government."[3] The United States disagrees.

4. In the view of the United States, the term "in light of the attendant circumstances" means, in general terms, that the factual context surrounding the request for a panel, including any record of the consultations or other communications between the parties, or the circumstances of the

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[1] Panel Report at para. 7.19, *citing* Report of the Appellate Body, *Korea–Definitive Safeguards Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted January 12, 2000 ("*Korea-Dairy*"), at para. 124 (emphasis in Panel report).

[2] Panel Report at para. 7.22.

[3] *Id.*

measure being reviewed, may mean that a relatively abbreviated description of the legal claim may be sufficient to satisfy the requirement of Article 6.2 DSU that the request "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The attendant circumstances will not, however, normally include the underlying antidumping investigation itself.[4]

5. Accepting an interpretation of "attendant circumstances" that would include issues raised before investigating authorities during the antidumping investigations underlying a panel dispute would defeat the purpose of Article 6.2 DSU, which is to "present the problem clearly" to the defending party, third parties, and the Panel. It is not enough that a party be aware of the possible universe of issues which may be challenged before a panel; the specific issues must be made clear in the panel request.

6. For instance, focusing on Article 3 of the Antidumping Agreement, it is possible to imagine that the record of a particular investigation would give rise to potential claims under paragraphs 1, 2, 4, and 5. Nevertheless, a complainant would be fully within its rights to choose to appeal under only one paragraph, or under any combination of the four. Under Article 6.2 of the DSU, the defending party is entitled to know under *which* of the paragraphs of Article 3 its decision is being challenged. It is not required to guess.

7. Furthermore, interpreting "attendant circumstances" to include the underlying antidumping investigation would be illogical, given the context of Article 6.2 DSU. Article 4 of the DSU provides for consultations before a Member requests a panel, and envisions that, in the normal case, such consultations will have been held before a panel is requested. Nonetheless, Article 6.2 requires a complaining Member to set forth in the panel request a summary of the legal basis for the complaint, sufficient to state the problem clearly.[5] If engaging in consultations does not serve to relieve a Member of this obligation, then the fact that certain arguments may have been raised during the underlying antidumping investigation cannot do so either.

8. Finally, the Panel's view of "attendant circumstances" fails to take into account the interests of third parties, as required by Article 10.1, or of the Panel itself. It is entirely possible that third parties may not have been involved in the investigation before the national authorities (as was the case here with respect to the United States), and it is certain that the Panel will not

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[4] A possible exception is circumstances where aspects of the underlying investigation would make certain claims unlikely. For example, Article 6.10 of the Antidumping Agreement applies in cases, among others, where there are numerous exporters. Since the underlying investigation at issue here involved only one exporter, it is unlikely that Poland believed it had a claim based on the "multiple exporter" provisions of Article 6.10.

[5] The consultation process assumes that Members have entered into consultations, as required by Article 4.2, with an intent to "accord sympathetic consideration" to the views of the other Member. The result of such sympathetic consideration may well be that, although consultations do not fully resolve a dispute, some of the issues that appeared to be in dispute before consultation have been resolved satisfactorily to the complaining Member.

have been. In such a situation, neither the third parties nor the Panel will be able to interpret the meaning of a panel request in view of communications that took place during the investigation. As the Appellate Body has noted, one of the purposes of the panel request is that it "informs the defending party *and the third parties* of the legal basis of the complaint."[6]

B. The Fact That Language in a Panel Request "Relates To" Particular Provisions in a WTO Agreement Does Not Constitute an Appropriate Standard for Determining Compliance with Article 6.2 of the DSU

9. In addition to rejecting Thailand's claims that Poland's panel request was insufficient with regard to Articles 2 and 5 of the Antidumping Agreement, the Panel rejected Thailand's claim relating to Article 3. Poland's panel request referenced Article 3 of the Agreement in the following manner:

> Thai authorities have made a determination that Polish imports caused injury to the Thai industry, in the absence of, *inter alia*, "positive evidence" to support such a finding and without the required "objective examination" of enumerated factors such as import volume, price effects, and the consequent impact of such imports on the domestic industry, in contravention of Article VI of GATT 1994 and Article 3 of the Antidumping Agreement.[7]

10. Article 3.1 of the Antidumping Agreement states that:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of those imports on domestic producers of such products.

Comparing the text of Poland's panel request with the text of Article 3.1 demonstrates that Poland essentially paraphrased Article 3.1 in its request. It did not reference Articles 3.2, 3.4, or 3.5.

11. The Panel rejected Thailand's challenge to the adequacy of the Article 3 claim in the panel request by reasoning that the "specific language" in the request "relates to the text of Articles 3.1, 3.2, 3.4 and 3.5."[8] The standard that the Panel has adopted on this issue is troubling.

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[6] Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, at para. 142.

[7] *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Request for the Establishment of a Panel by Poland, WT/DS122/2 (15 October 1999).

[8] Panel Report at para. 7.36.

In the U.S. view, the fact that the language in a panel request merely "relates to" particular provisions in a WTO agreement cannot constitute an appropriate standard for determining compliance with Article 6.2 of the DSU. As Thailand notes in its appellant's submission (at para. 54), the language in Article 2.1 of the Antidumping Agreement "relates to" *every* subparagraph in Article 2. Indeed, one can fairly argue that *every* provision in the Antidumping Agreement "relates to" every other provision contained therein. Accepting a standard of such potential breadth would risk reducing the obligations in Article 6.2 to a nullity. The United States respectfully requests that the Appellate Body correct this aspect of the Panel's report.

12. The United States is also troubled by the Panel's apparent approval of the fact that Poland's panel request referenced factors "such as" import volume, price effects, and the impact of imports on the domestic industry. In the view of the United States, Poland's reliance on the term "such as" is reminiscent of the issue faced by the *Bananas* panel, which held that alleging inconsistency with certain provisions "among others" was insufficient to describe the legal problem at issue.[9]

C. The Panel Erred in Dismissing Thailand's Prejudice Claims in Light of Thailand's "Capable Participation" in the Panel Proceedings

13. Finally, the United States agrees with Thailand that the Panel should not have dismissed Thailand's claims of prejudice simply because Thailand mounted effective advocacy in response to Poland's arguments.[10] If this were the standard for prejudice under the *Korea--Dairy* decision, it would establish perverse incentives detrimental to the WTO dispute resolution system. The Panel's approach to this issue places a party facing an inadequate panel request in the untenable position of having to choose between (1) refusing to respond to a request that it believes deprived it of its rights under the DSU, with the enhanced risk of an unfavorable decision on the merits; or (2) responding fully to the extent possible, but at the cost of effectively waiving its objections to the inadequate request.

14. In addition, such questions as whether a complaining party shifted its positions during a proceeding in ways that an adequate panel request might have discouraged should also factor into a decision concerning prejudice, even if a responding party was able to put forth capable advocacy. In this regard, the United States believes that its inability to identify Poland's specific assertions affected its ability to respond fully in its third party brief.[11]

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[9] *See* Report of the Panel, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, at para. 7.30.

[10] *See* Panel Report at para. 7.37.

[11] *See* Third Party Submission of the United States at paras. 6, 8.

III. The Appropriate Standard of Review Under Article 17.6 of the Agreement

15. The United States generally agrees with the Panel's interpretation of the standard of review under Article 17.6 of the Agreement. The Panel found that the appropriate approach is to examine whether the establishment of the facts by the Thai investigating authorities was proper and whether their evaluation of those facts in the course of their investigation and at the time of their determinations "was such that an unbiased and objective investigating authority evaluating that evidence could have determined dumping, injury and causal relationship."[12] As we explain below, however, the United States has certain concerns about the manner in which the Panel *applied* the standard of review.

A. The Panel Erred In Holding that It Could Not Review Whether the Authority based Its Determination on Positive Evidence By Reviewing Confidential Information

16. The United States agrees with Thailand that the Panel misinterpreted Article 17.6(i) of the Antidumping Agreement when it concluded that it should not consider confidential information in the administrative record in determining whether the Thai authorities' injury determination complied with Article 3. The standard of review set out in Article 17.6(i) of the Agreement requires a panel to "determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." In antidumping investigations, both confidential and non-confidential documents make up the record of facts, and it is upon an evaluation of the entire record of an investigation that the authorities make determinations. Thus, in order for a panel to properly determine whether the investigating authorities' establishment of the facts was proper, it must evaluate all of the facts made available to it by the defending party; these may include confidential facts that were part of the administrative record.

17. The Antidumping Agreement recognizes that an authority conducting an antidumping investigation may need to gather and rely on information that is confidential by nature, and that such information may not be available to all interested parties. Article 6.2, for example, qualifies the obligation to provide interested parties with a full opportunity for the defense of their interests with the proviso that such opportunities "must take account of the need to preserve confidentiality." Similarly, Article 6.4 states that the obligation to provide timely opportunities for interested parties to see information relevant to the preparation of their cases, whenever practicable, is limited to information "that is not confidential as defined in paragraph 5." The obligation under Article 6.7 to make the results of verification investigations available is made subject to the requirement to protect confidential information. Finally, Article 6.5 contains a flat obligation not to disclose confidential information without specific permission of the party

[12] *See* Panel Report at para. 7.51.

submitting it.

18. This recognition of the need to protect confidential information also appears in Article 12 of the Antidumping Agreement. Article 12.2 requires that "public notice" be given of any preliminary or final determination, and that each such notice set forth in sufficient detail the authority's findings and conclusions reached on all material issues of fact and law. However, Articles 12.2.1 and 12.2.2 both note the necessity of paying due regard in such notices to the requirement for the protection of confidential information. The Panel appears not to have fully appreciated the relevance of Articles 6 and 12 as context for interpretation of Articles 3 and 17.6 because it found that Poland's panel request did not properly raise a claim under Article 6 and the panel request did not mention Article 12.

19. Reading these provisions together makes clear that the "positive evidence" on which an authority may need to rely in making a determination of injury under Article 3 may necessarily include confidential information that it could not make available to interested parties during its investigation or state in its public notice or report. These same provisions provide the relevant context for the interpretation of Article 17.6(i), which obligates a panel to "determine whether the authorities' establishment of the facts was proper." The United States agrees with the Panel to the extent that it is recognizing that the determination of whether the facts were properly established must be based solely on information obtained by the authority during its investigation. It does not appear, however, that there is any question in this dispute that the report at issue was legitimately part of the administrative record.[13] Since an authority may rely on confidential evidence that was not available to interested parties in establishing the facts under Article 3, the Panel incorrectly applied Article 17.6(i) when it concluded that it must limit its review of the Thai authorities' injury determination to the facts and reasoning which were disclosed to the parties at the time of the final determination.[14]

20. Moreover, no obligation to state confidential information in a determination can be properly derived from Article 3. As is reflected in the recent panel decision in *European*

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[13] *See* Panel Report at para. 7.148. If it was *not* part of the administrative record, the Panel would have been correct to disregard it (our ability to take an informed position on this issue is limited, since we have not viewed the confidential report).

[14] The United States can envision cases, for example where administrative protective order procedures are followed during investigations, where the representatives of interested parties may have had access to confidential information during the underlying antidumping investigation, but a Member finds itself unable to obtain the necessary consent to disclose such information to a panel. The United States' remarks on the issue at hand do not address that different situation, and the United States does not view its position in the present dispute as suggesting in any way that a review of such confidential information would be necessary for a panel in such circumstances. In this case, Thailand *was* able to present the information to the Panel, and the Panel should have considered it in making its determination under Article 3.

Communities – Bed Linens,[15] interpreted in view of their ordinary meaning, the terms used in Article 3.1, 3.4, and 3.5 – "examination" and "evaluation" – concern what authorities must consider, not what they must state.[16] Thus, for example, while under Article 3.4 an examination of the impact of dumped imports must include an evaluation of all relevant factors, Article 3 does not state how a determination shall reflect that evaluation. Article 3.5 requires that the demonstration of a causal link must be "based on an examination of all relevant evidence before the authorities." This article makes plain that an authority is not entitled to exclude evidence from examination simply because it is confidential. At the same time, Article 3.5 does not state that the demonstration must include all relevant evidence, only that it must be based on an examination of all relevant evidence in the authority's investigatory record. Thus, the determination need not state each item of relevant evidence, but only reflect the results of an examination of the entire record.

21. Finally, the United States observes that, in a particular case, the manner in which an investigating authority approaches the issue of confidential information might give rise to a possible claim under Article 6.2 of the Antidumping Agreement (and similar provisions). For example, if a country declines to implement a system in its national law that permits disclosure of information under administrative protective order, a failure to disclose the existence of confidential information or reports including such information, or a failure to provide a sufficient non-confidential summary of the same, may affect whether an interested party has a full opportunity to defend its interests. That issue does not arise in the present case, since the Panel rejected Poland's Article 6 claims due to an insufficient panel request.

B. An Investigating Authority in an Antidumping Investigation Must Evaluate All of the Enumerated Factors In Article 3.4

22. In the view of the United States, the Panel was correct in determining that the language of Article 3.4 is mandatory, making it clear that all of the listed factors in Article 3.4 must be evaluated in all cases. Article 3.4 specifically requires that the investigating authorities' examination of the impact of the dumped imports on the domestic industry include an evaluation:

> of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential declined in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of the dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

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[15] Report of the Panel, *European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, October 30, 2000 ("*European Communities– Bed linens*").

[16] *See id.* at paras. 6.162-6.168

23. Thus, the text of Article 3.4 makes each of the 15 individual factors listed in Article 3.4 *prima facie* relevant to an injury determination. Accordingly, all factors must be evaluated by the investigating authorities.[17] The Panel also correctly stated that the requirements imposed by article 3.1 of "positive evidence" and "objective examination" do not mean to establish a mere checklist approach to the evaluation of the Article 3.4 factors. To this end, the United States agrees with the Panel's finding that the importance of certain factors may vary significantly from case to case, and that in certain circumstances other non-listed factors may be deemed relevant. The Panel, therefore, correctly found that a proper analysis under Article 3.4:

> does not derive from mere characterization of the degree of "relevance or irrelevance" of each and every individual factor, but rather must be based on a thorough evaluation of the state of the industry and, in light of the last sentence of article 3.4, must contain a persuasive explanation as to how the evaluation of the relevant factors led to be determination of injury.[18]

24. The Panel's decision suggests, and the United States believes, that *evaluation* of each factor does not necessarily require that the authorities make a *finding* as to each factor. The text of the final determination as a whole may reflect how the investigating authorities evaluated all of the Article 3.4 factors even if the authorities do not make a separate finding as to each one. The Panel below did not reach the issue of whether the lack of a specific finding on a factor meant that the authority had failed to evaluate that factor. Since Thailand took the position that it was not required to evaluate all of the enumerated factors, the Panel reached only the narrower issues of whether Thailand was obligated to evaluate all of the Article 3.4 factors and whether it was apparent from its final determination that it did so. Thailand does not in this appeal argue that it in fact evaluated each factor, but rather that it was not required to do so. Therefore, this appeal does not present to the Appellate Body the question of what findings may be necessary in particular cases to reflect the evaluation of the Article 3.4 factors.

25. The United States disagrees with Thailand that the Panel's decision is in error because Article 17.6(ii) and "the customary rules of interpretation of public international law" *require* a panel to make a determination as to whether Article 3.4 "admits of more than one permissible interpretation."[19] The Panel's decision carefully establishes, based on the ordinary meaning of the terms used in Article 3.4, in context, the reasons why each of the 15 enumerated factors of Article 3.4 must be evaluated. The Panel's decision thus explains why Thailand's alternative interpretation of Article 3.4 – that only four factors are mandatory – is not permitted by the terms used in the Agreement.[20] In so doing, the Panel demonstrates that it considered whether this

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[17] A similar conclusion was reached by the Panel in *Mexico–Antidumping Investigation on High Fructose Corn Syrup(HFCS) from the United States,* WT/DS132/R, adopted February 24, 2000 at para. 7.128.

[18] Panel Report at para.7.237 (emphasis added).

[19] Thailand Appellate Brief at para. 222.

[20] Panel Report at paras. 7.226 - 7.229

aspect of Article 3.4 may have "more than one permissible interpretation" and ultimately determined that it only has one. While it may have been preferable for the Panel to make this framework for its analysis as explicit as Thailand urges, the Panel's route to its conclusion is reasonably discernable.

IV. Conclusion

In conclusion, the United States thanks the Panel for providing an opportunity to comment on the important issues at stake in this proceeding, and hopes that its comments will be useful.